

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session
Friday, September 10, 1999

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:09 a.m. at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners William Deaver, Kathleen Makel and Carol Scott were present.

Item #1. Approval of the Minutes of the August 6, 1999, Commission Meeting.

The minutes of the August 6, 1999, Commission meeting were distributed to the Commission and made available to the public. Commissioner Makel moved to accept the minutes as presented. Commissioner Deaver seconded the motion and it carried unanimously.

Item #2. Public Comment.

Tony Miller, representing himself, apologized to the Commission and staff for any statements he may have made that suggest that he believes the Commission and staff lack integrity, act in a partisan manner, or do not take seriously their responsibilities to insure that the the Political Reform Act is fairly and efficiently enforced. He stated that he does not believe any of those things and regrets any suggestion to the contrary.

Lance Olson, representing the California Political Attorney's Association, expressed his concern about item 3 on the agenda, the proposed Shubin stipulation. He noted that if the Shubin stipulation is adopted as presently drafted, it will represent a major shift in policy by the Commission. He stated that in this case, one count of laundering had been charged as two violations of the Political Reform Act (Sections 84301 and 84300(c)). He charged that 15 instances of violations had become 30 counts because of "creative pleading ." Mr. Olson felt that this would be a bad policy for the Commission because Section 84300(c) is not intended to cover this type of situation and because if it is used it criminalizes a lot of activity that is considered legal.

Chairman Getman noted that other stipulations had charged both statutes, but that there had not been any fining of both statutes. Mr. Olson agreed, but felt that 84300 (c) should not be used as a violation at all.

Ben Davidian, with the law firm of Wilke, Fleury, Hoffelt, Gould and Birney, echoed Mr. Olsen's concerns. He noted that there may have been a precedent for this in 1993 in the Lucas Dallas Inc., case, while he was the Chairman of the Fair Political Practices Commission. He

further stated that if it was approved by that Commission, it was a mistake.

Commissioner Scott stated that the Commission continues to try to get as much input as possible from the public and wants to see the Commission take a proactive stance in dealing with those issues. She also noted, however, that any input should be focused on issues, not personal attacks.

Item #3: In the Matter of William M. Shubin, Martha Shubin, Sabor Environmental Services, Inc. d/b/a Thrifty Best Pumping Service, Central California Waste Paper, Inc., and Universal Plumbing and Drain Line Service, FPPC No. 97/454.

Enforcement Division Chief Cy Rickards reported that Mr. Luppino, who is Mr. Shubin's lawyer, had requested that this matter be postponed until the October meeting, so that both he and his client could be at the hearing.

Because there was no opposition to hearing the case at the October meeting, Chairman Getman agreed that it be held over. She proposed that Mr. Olson's and Mr. Davidian's concerns be considered at that meeting as a policy matter, and this case would be decided at that time based on the policy decision.

Item 5: In the Matter of EJE, Inc. d/b/a Escondido Jeep Eagle, and North County Ford, Inc., FPPC No. 97/145.

Commissioner Deaver motioned that the Commission accept the stipulation proposed. Commissioner Makel seconded. There being no opposition, the motion carried.

Items #6, #7, #8, #9:

Chairman Getman proposed that these items be held over until the end of the meeting, if time permits. If there is not enough time, they will be held over until the October meeting.

Item #4: In the Matter of Rudy G. Favila, Rudy Favila for Ontario, Rudy Favila for County Supervisor, and Janice E. Phillips, Treasurer, FPPC No. 96/366.

Commissioners Scott expressed her concern that the fines were too low, and that the public harm evaluation was not in the stipulation.

Senior Commission Counsel Mark Soble presented the nine count stipulation with a recommended fine of \$8,000.00. Mr. Soble noted that the total amount combined that would have been reported on the statements for counts one and two would have been \$2900.00. He added that Mr. Favila may have missed filing these two statements because he had more than one committee and this particular committee had very little activity. He stated that fines of \$250.00 each would be appropriate and noted that counts four and five involve only about five percent of the total contributions. Mr. Soble remarked that this case had a number of small violations

which, while many might not have been charged individually, were enough collectively that charges needed to be filed.

Chairman Getman motioned that the stipulation be approved. Commissioner Makel seconded the motion. There being no opposition, the motion carried.

Item #10: Consideration of change in policy on private attorney general actions concerning major donor reports.

Enforcement Division Chief Cy Rickards noted that he will be contacting the Secretary of State's Office to work with them on this issue.

Legal Division Counsel Steve Russo presented five proposals for major donor case policy changes, suggesting that the fourth and fifth options be adopted, creating a streamlined prosecution program that would strike a balance between the limited enforcement resources and those cases that need to be prosecuted.

Attorney Tony Miller stated that the Commission should be focused on compliance, not workload management. He added that enforcement should be done by the FPPC, and that the private attorney general actions should be a fallback position when there is not appropriate enforcement. He noted that some major donor reports are currently being filed before an election and more will be filed before the election if the Legislature adopts the quarterly filing approach. Only the major donor reports include information about the economic affiliation of the major donor. He stated that the major donors should indicate those affiliations with much more specificity.

Mr. Miller stated that the major donor threshold should be increased, and noted that the Unz/Miller initiative recommends increasing it to \$100,000.00, which he thought was high. He noted that, in the enforcement context, he saw no difference in whether it is a single large contribution that is made or a number of contributions that are made.

Mr. Deaver noted that resources are important and have to be considered. Mr. Miller responded that priorities need to be set, and that private attorney general actions can handle those cases that the Commission lacks the resources to handle.

Chuck Bell, with the law firm of Bell, McAndrews and Hiltachk, stated that this is not just a resources issue, it is a justice issue. By deferring or defaulting on the cases, he felt the Commission was changing the overall enforcement policy of the Act. He felt that most cases involved donors who made a single contribution and failed to file or filed late their contribution statement. Those cases which are taken over by a private attorney general action get more fines than is merited, in his view. He stated that the proposals deal with that issue and assert the Commissions' primisys in shaping enforcement policy. He did not agree that cases should be turned over to private attorney generals. Mr. Bell felt that the definition for major donors should

be modified to cover donors who contribute to multiple campaigns. He encouraged proactive efforts by the Commission, and he added that option #4 was an appropriate proposal. He also stated that there was a role for cease and desist stipulations, which could conclude that it is not appropriate to fine.

Mr. Russo stated that a cease and desist order would not have a lot of meaning since it would be saying that one needs to obey the law in the future, which is something they are already obligated to do. It would have a practical effect like a formal reprimand and a warning. The Enforcement Division chose not to go in that direction, preferring at least a relatively low fine be imposed if an action was necessary.

Mr. Bell responded that people who receive warning letters do not always understand the importance of them. He noted that the process of trying to prove that one should not be fined may cost more money than entering into a stipulation with a small fine. He added that in those cases, the major donor should be required to file a campaign statement.

He noted that the Commission was flooded last year with a number of the major donor cases and was unable to determine whether many of those cases were important to pursue an enforcement action. He added that it is the responsibility of the FPPC to interpret and enforce the Act, and by defaulting to a private attorney general action, the Commission is inappropriately shaping enforcement policy. He encouraged the Commission to determine what is appropriate to enforce, and if it is not serious or major, deal with it on a streamlined basis.

Commissioner Scott expressed her concern that option four would send a message that disclosure does not mean anything in California. She stated that the issue should be in establishing enforcement priorities while still allowing private attorney general actions.

Chip Nielsen, with the law firm of Nielsen/Merksamer, noted that there should be a “no fine” option available, for example, when the accused person has died. Under the proposal, the Commission or a private attorney general could ask the survivor to pay the fine. Mr. Rickards argued that the “extraordinary circumstances” clause would prohibit that from happening.

Chairman Getman stated that the Commission needs a more active enforcement program that focuses on compliance. She added that she believes that private attorney generals should bring to the attention of the FPPC areas in which the compliance was not sufficient. She also believes that it is the Commission’s responsibility and duty to decide what to do about those problems. She supported option four, which would have the FPPC be responsible for the actions, and noted that the private attorney generals would still be able to bring to the attention of the Commission any cases which need pursuing.

Commissioner Scott felt that option four should include all major donors and make specific criteria within that, and noted that the fines in option four were too low. Mr. Rickards responded that the options are trying to strike a balance between fairness and how much time is put into a

streamlined program. Mr. Russo described the types of cases which would not qualify for the streamlined program and explained that they would be dealt with by Enforcement Division actions or by being deferred to the private attorney general. These decisions will consider how serious the case is, whether there are mitigating factors, and whether there are resources available to bring the case.

Enforcement Division Chief Investigator Al Herndon explained the previous FPPC major donor enforcement policies. Potential major donor nonfilers were identified through spending reports prepared by FPPC Technical Assistance Division. Letters were sent to them requesting compliance, and in a few cases enforcement actions were begun because there was a prior filing history, or there was a failure to respond to the FPPC letters, or other aggravating circumstances. He believed that in 1989, the program was transferred to the Secretary of State's Office.

Chairman Getman stated that there are resources available for enforcement. The issue is in how the Commission chooses to use those resources.

Mr. Rickards pointed out that compliance is the main goal. He noted that most people do not want to have to deal with an FPPC action. In addition to enforcement actions, voluntary compliance must be encouraged. He disagreed with Mr. Miller that this option would decrease compliance with the Act. He requested that the Enforcement Division be allowed to try this option to see if it works.

Chairman Getman noted that the Enforcement Division would like the opportunity to try this option, because if it is successful they would not have to devote as many resources to prosecuting private attorney general actions, and then they could use those resources to take a more active approach in identification.

Mr. Rickards noted that this option would not take away any right the public has to take action. Chairman Getman added that private attorney generals would still be able to file actions, and that the FPPC would then decide whether to enforce each one of them.

Caren Daniels-Meade, Chief of the Political Reform Division of the Secretary of State's Office, stated that electronic filing should make identifying major donors easier, and that her office had fined a large number of major donors. Chairman Getman noted that the FPPC and the Secretary of State's Office are striving to work together on compliance, forms simplification, and enforcement.

Commissioner Deaver made a motion that option four be approved.

Commissioner Scott asked that the criteria be reconsidered.

Chairman Getman suggested that option four be approved, and that staff discuss with Commissioner Scott the criteria she feels are important, and then to bring recommendations back

to the Commission based on those criteria.

Chairman Getman seconded the original motion.

Commissioner Makel felt that the fines were too low. Enforcement Counsel Amy Holloway outlined the SEI fines. Mr. Russo explained that the fines proposed were determined by comparing them to the SEI fines.

Mr. Russo clarified that the major donors that the Commission is considering are from the March and November 1998 elections.

Commissioner Deaver modified his motion to approve option four but to increase each of the fine amounts by \$200, so that the fines would range from \$400.00 to \$1,000.00. Chairman Getman seconded the motion. Commissioner Scott voted nay, but noted that she would be willing to change her vote to an abstention if staff would work with her on the criteria, with the Commissioners' authorization. Chairman Getman noted that Commissioner Scott did not need authorization from the Commission to work with staff. Commissioners Deaver, Makel, and Chairman Getman voted aye. The motion carried.

Chairman Getman adjourned the meeting for a break at 10:55 a.m.. The Commission meeting reconvened at 11:05 a.m.

Item #12: Request to rescind Leidigh Advice Letters, A-99-200; A-99-200a and/or issue an opinion regarding whether the prohibition in Government Code § 85320 applies to U.S. citizens domiciled abroad; or, in the alternative, to support urgency legislation amending § 85320.

Chairman Getman reported that she and Secretary of State Bill Jones sent a letter to the Legislature bringing to its attention the problems with the statute. The bill to amend the statute will not be heard this term so there will not be any legislative solution for Mr. Leidigh's clients in time for the upcoming election.

Commissioner Scott reported that her research indicated that an administrative agency does not have the authority to correct legislative omissions, and that interpretations of this kind rest with the court.

Robert Leidigh, representing Martin W. Inderbitzen and Frederic and Kevin Lin, stated that the law is unconstitutional because it abridges his clients' constitutional rights. He stated that the standards of statutory construction include inquiries into whether the law contains ambiguity or reaches an absurd result. He added that footnote two of the advice letter demonstrated both the ambiguity and the absurdity of the statute. Mr. Leidigh interpreted the law to mean that a person who is on vacation in another country would not be allowed to contribute to a ballot measure. He stated that the FPPC had a broader responsibility to try to make the Act work in a way that makes

sense and is fair and rational. He noted that since the August meeting Section 83111.5 has become part of the Political Reform Act, dictating that the Commission shall not take any action that will abridge First Amendment and Fourteenth Amendment rights, and therefore the Commission has a duty to effectuate the intent of the Legislature.

Chairman Getman noted that she did not find that legislative intent in the materials presented by Mr. Leidigh. She agreed that if the plain language was capable of more than one reading, it would be appropriate to read it, taking into account the constitutional ramifications.

Commissioner Scott disagreed with Mr. Leidigh's interpretation of the statute and suggested that Mr. Leidigh's clients may need to take the case to court.

Commissioner Deaver agreed that it is an absurd situation, but saw no legal means to correct it.

Mr. Woodlock clarified the definition of "absurd result," noting that Mr. Leidigh's use of the phrase was legally incorrect. He took issue with Mr. Leidigh's also explanation of the federal common law of domicile.

Chairman Getman explained to Mr. Lin that the Commission could not go beyond its statutory authorization to help him. She expressed her sympathy for his situation and noted her intention to renew the Commission's request to the Legislature to take care of this problem. She moved that the two advice letters stand as written and that the Commission not issue an opinion in this matter. Commissioner Makel seconded the motion. The motion carried unanimously.

Item #11: Adoption of formal opinion prepared by the Commission regarding the application of the "legally required participation" exception when two vacancies exist in the California Integrated Waste Management Board. (In re Tobias, No. 0-99-156.)

Commissioner Makel questioned the inclusion of the concept that the Commission will be weighing the nature and extent of the conflict against the importance of the decision. She added that one either has a conflict or one does not, and that the item has already been considered by the time that it has been determined that there is a conflict. She did not believe that the Commission could make a decision as to the importance of an agency's decision and did not think that these items should be included.

FPPC Counsel Julia Butcher advised the Commission that the nature and extent of the conflict, assuming there is one, is limited, because the interest in these companies is less than two percent, and these large companies are only indirectly involved in the decision.

Commissioner Makel noted that it should not make a difference. If this was the only way a decision could be reached then it should be done.

Chairman Getman stated that the FPPC should not be assessing the importance of what other

agencies are doing. She suggested that the opinion be signed as written with a concurrence saying that in her view the nature of the decision and the extent of the conflict are not relevant factors. She further suggested adding that in this particular case it is true that the extent of the conflict was outweighed by the importance of the decision, but in the future those factors would not be considered.

Commissioner Scott agreed that the paragraph discussing the nature and extent of the conflict could be taken out.

Commissioner Scott asked about the criteria in the fourth paragraph on page four of the Opinion.

Ms. Butcher stated that this criteria was not from a legal source. She added that it was a process of the Commissioner's drafting. She explained that the first draft was limited to the facts, and that the paragraph in question looked at the specific facts and made a general statement.

Chairman Getman motioned that the Opinion be adopted as written with the exception that the paragraph that begins, "In addition, we believe that the nature and extent of the conflict is outweighed by the importance of the decision," be deleted; and that, in addition, Chairman Getman draft a short concurrence which says that she disagrees that the nature of the decision and the nature of the conflict are factors that need to be looked at in these cases.

Commissioner Makel seconded the motion.

Mr. Churchwell pointed out that, under current advice, a vacancy does not allow someone to vote when they have a conflict. The Commission's action would result in the exact opposite. If a position is vacant and the person with a conflict is needed to make a quorum, it can be done in every case. Mr. Churchwell stated that Mr. Roberti's economic interest was indirectly involved in the decision, making it easier to go forward than it would be if it was directly involved.

Chairman Getman revised her motion to approve the Opinion as written with two changes: (1) Elimination of the paragraph on page 5 of the draft that begins, "In addition, we believe that the nature and extent of the conflict is outweighed by the importance of the decision," and (2) that the paragraph on page 4 of the draft that begins, "In determining whether the Rule applies in the context of a vacancy," should be changed so that the word "looks" in the second line be changed to "looked," and that "the nature of the conflict," and "whether the conflict is outweighed" be eliminated from the last full line of the same paragraph so that the paragraph will read as follows:

"In determining whether the rule applies in the context of a vacancy the Commission looked to a number of factors which include the nature of the decision, whether there is an alternative method of decision making consistent with the purpose and functions of the particular agency, whether the agency can change the quorum requirements or appoint an alternative or interim member who can vote, whether the decision must be made within a specified time period and the importance of the agency moving forward."

Commissioner Scott requested that the motion include that it was limited to the facts, because the Commission did look at the conflict in this case and would look at the conflict in other cases.

Chairman Getman made another amendment to the motion, adding, “Based on the facts presented to the Commission, and limited to those facts, we conclude that Senator Roberti may invoke the rule...”

Commissioner Makel seconded the motion and the motion carried unanimously.

Item #14A: Legislative Report-Approval of Proposed Legislation Concerning Campaign Reporting; Simplification Project.

Jim Knox, Executive Director of California Common Cause, expressed concern regarding the timing of the reports that occur immediately before an election and noted that they will oppose legislative changes in the timing of disclosure of those reports. He stated that the late contribution period should be diminished, not extended, because access to meaningful information by the public is much easier when it is compiled in a single report. If the information is scattered over a longer period it becomes much more difficult to make sense of it. It would allow filers the opportunity to funnel late contributions into that twenty day period when it is harder to track.

FPPC Counsel Hyla Wagner explained that the change was a compromise with the preparers who expressed the need for more time to prepare the report.

Mr. Knox stated that treasurers have been able to file the reports in a timely manner and that electronic filing should make that an even quicker process. He added that time should be decreased, not increased and that the convenience of the treasurers should not outweigh the public’s right to have the information in a timely fashion.

Mr. Churchwell noted that the treasurers do need the extra time. Amendments are often filed because of omissions on the original form because the treasurers are rushing to get them done. He thought that extending the late period will result in a reporting system that will be complied with to a much larger degree than the current system.

Mr. Knox proposed that the filing deadline should be seven to ten days out, not twenty days out. He noted that part of the proposal would eliminate some of the subvendor’s information, decreasing the workload of the treasurers.

Ms. Wagner noted that the treasurers have also complained that the quarterly reports allow only fifteen days to file instead of the thirty days previously allowed on the semi-annual reports. She stated that because the threshold for reporting subvendor information will be raised to \$500, it

would decrease the workload for the treasurers.

Commissioner Scott was excused to leave the meeting early.

Mr. Knox stated that it is more useful to have information in the preelection report than added later in daily late contribution reports.

Mr. Churchwell noted that the cutoff date for the report needed to be moved three days earlier because there is only one preelection report instead of two, and four annual reports instead of two. Even though the number of reports is the same, it is important that the information be accurate and that enough time be allowed to prepare accurate reports.

Chip Nielsen, with the law firm of Nielsen Merksamer, stated that it is not a problem for a single campaign with a small budget and one person who can work full time to fill out the report within five days. He also noted that it is very hard for a professional treasurer to fill the reports out quickly because of the heavy workload at that time of year, and there is not enough time to complete them all. He added that late donors are currently reported and the press has that information on a daily basis.

Ms. Wagner noted that the Secretary of State's Office requested that the 501 forms for local candidates be filed at the local level and that change has been incorporated in the draft legislative proposal. She added that the changes in AB974 will be taken out because the bill was not signed by the Governor.

Chairman Getman motioned that the draft legislation be approved as written but without the major donor change, which will be considered at the October meeting. Commissioner Makel seconded the motion. The motion carried without opposition.

Chairman Getman requested that staff follow up on Legislative Coordinator Scott Tocher's research on the nature of an employer's interest in major donor cases.

Item #14: Legislative Report.

Legislative Coordinator Scott Tocher presented the legislative items.

AB 974 (Papan) was sent to the Governor's Office. The Governor objected to the provision reducing the percentage of lobbying firms subject to audit from twenty-five percent to fifteen percent. Chairman Getman, Commissioner Deaver and staff prepared a letter for the Governor explaining the historical background of the provision. The Governor's objections remained, and the author rescinded the measure from the Governor and sent it to the Senate desk. Mr. Tocher requested approval to have that provision of the bill relating to lobbyist audits amended out of the bill, adopt an urgency clause if there is support for it, and get the measure back on the Governor's desk next session.

Chairman Getman motioned that Mr. Tocher's request be approved. Commissioner Deaver seconded the motion and it carried unanimously.

Mr. Tocher reported that AB 1274 (Frusetta) was enrolled to the Governor on September 8th, 1999, and that AB 1692 (Con. Pro.) was signed by the Governor and is now Chapter 339.

Mr. Tocher noted that SB 1025 (Johnson) was enrolled to the Governor, and that the measure has been amended to require that the Commission publish the Political Reform Act, make reasonable numbers of copies available to governmental agencies and their subdivisions, and to provide copies at cost to the public. He noted that staff had prepared a fiscal analysis and had set forth four approaches that the Commission may consider in complying with the measure should the Governor sign the bill. Mr. Tocher explained some of the language of the bill that needed to be clarified during the next legislative session.

Chairman Getman motioned that the Commission support the provision that requires the FPPC to disseminate copies of the Political Reform Act to people who are required to follow it, that the Commission look into cost effective ways of doing that, that it be included as part of the Commission's budget change proposal, and that the Commission ask for a public education unit to help provide the best possible job of making that information available. Commissioner Deaver seconded the motion and it carried unanimously.

Mr. Tocher requested that the Commission grant authorization for Government Relations to take the approved Forms Simplification Project to the Legislature. The Commission granted the authorization. Chairman Getman noted that some discussions with the leadership of the legislature have already begun.

Item #13: Adoption of policy goals for the Commission in 1999-2000.

Chairman Getman noted that this item will be considered at the October meeting and encouraged the public to read the proposal and offer suggestions they may have regarding allocation of resources and the direction of the Commission. She added that in addition to the policy goals, the Commission would also be looking at the proposed budget for the coming year and that a budget change proposal will be made available.

Litigation Report.

Mr. Churchwell reported that oral argument in *Griset* may be set for December or January.

He noted that FPPC Counsel Lisa Ditora would be resigning from her position at the FPPC and returning to private practice.

Item #16: Executive Director's Report.

Chairman Getman noted the luncheon program in November at the Holiday Inn would be available at cost, and that those who wish to attend without lunch may do so for free. She discussed the program and encouraged people to attend.

The Commission meeting adjourned for closed session at 12:15 p.m.

Item # 17: Pending Litigation (Gov. Code § 11126(e)(1).)

A. Griset v. FPPC.

B. California ProLife Council Political Action Committee v. Scully.

Item #18: Discussion of Personnel. (Gov. Code § 11126(a)(1).)

The Commission returned from closed session and reopened the meeting to the public at 1:15 p.m.

The meeting was adjourned at 1:16 p.m.

Dated: Sept. 21, 1999.

Prepared by:

Sandra A. Johnson
Executive Secretary

Approved by:

Chairman Getman